

- A **PALAUTAH SINNAPPAYAN & ANOR**
v.
TIMBALAN MENTERI DALAM NEGERI,
B **MALAYSIA & ORS**
FEDERAL COURT, PUTRAJAYA
AUGUSTINE PAUL FCJ
ZULKEFLI MAKINUDIN FCJ
MOHD GHAZALI YUSOFF FCJ
C [CRIMINAL APPEAL NOS: 05-57-2009 & 05-58-2009 (W)]
14 DECEMBER 2009

D **PREVENTIVE DETENTION:** *Detention - Application for habeas corpus - Deprivation of legal representation during detention period - Whether invalidated detention process - Principle of autrefois acquit, whether applicable - Scope of art. 7(2) Federal Constitution - Whether confined to punitive detention alone arising from criminal proceedings instituted under Attorney General's direction - Validity of detention order - Federal Constitution, arts. 5(3), 7(2), 145, 149, 150*

E **PREVENTIVE DETENTION:** *Detention - Whether lawful - Habeas corpus, application for - Deprivation of legal representation during detention period - Whether invalidated detention process - Principle of autrefois acquit, whether applicable - Scope of art. 7(2) Federal Constitution - Whether confined to punitive detention alone arising from criminal proceedings instituted under Attorney General's direction - Validity of detention order - Federal Constitution, arts. 5(3), 7(2), 145, 149, 150*

G **PREVENTIVE DETENTION:** *Detention order - Detention under Emergency (Public Order and Prevention of Crime) Ordinance 1969 - Habeas corpus - Deprivation of legal representation during detention period - Whether invalidated detention process - Principle of autrefois acquit, whether applicable - Scope of art. 7(2) Federal Constitution - Whether confined to punitive detention alone arising from criminal proceedings instituted under Attorney General's direction - Validity of detention order - Federal Constitution, arts. 5(3), 7(2), 145, 149, 150*

H **PREVENTIVE DETENTION:** *Detention order - Right to counsel - Deprivation of legal representation during detention period - Whether invalidated detention process - Federal Constitution, art. 5(3)*

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PREVENTIVE DETENTION: *Detention order - Validity - Principle of autrefois acquit, whether applicable - Scope of art. 7(2) Federal Constitution - Whether confined to punitive detention alone arising from criminal proceedings instituted under Attorney General's direction* A

PREVENTIVE DETENTION: *Detention order - Grounds for detention - Allegation of fact - Whether Deputy Minister satisfied himself of grounds upon which detention order made - Whether Deputy Minister acted mala fide* B

PREVENTIVE DETENTION: *Detention order - Allegations of fact - Whether Deputy Minister satisfied himself of grounds upon which detention order made - Whether Deputy Minister acted mala fide* C

CRIMINAL PROCEDURE: *Habeas corpus - Application for habeas corpus - Preventive detention - Deprivation of legal representation during detention period - Whether invalidated detention process - Principle of autrefois acquit, whether applicable - Scope of art. 7(2) Federal Constitution - Whether confined to punitive detention alone arising from criminal proceedings instituted under Attorney General's direction - Validity of detention order - Federal Constitution, arts. 5(3), 7(2), 145, 149, 150* D
E

CRIMINAL PROCEDURE: *Habeas corpus - Emergency (Public Order and Prevention of Crime) Ordinance 1969, detention under - Deprivation of legal representation during detention period - Whether invalidated detention process - Principle of autrefois acquit, whether applicable - Scope of art. 7(2) Federal Constitution - Whether confined to punitive detention alone arising from criminal proceedings instituted under Attorney General's direction - Validity of detention order - Federal Constitution, arts. 5(3), 7(2), 145, 149, 150* F

CRIMINAL PROCEDURE: *Autrefois acquit - Applicability of principle - Detention orders, validity of - Scope of art. 7(2) Federal Constitution - Whether confined to punitive detention alone arising from criminal proceedings instituted under Attorney General's direction* G

CONSTITUTIONAL LAW: *Preventive detention - Application for habeas corpus - Emergency (Public Order and Prevention of Crime) Ordinance 1969, detention under - Deprivation of legal representation during detention period - Whether invalidated detention process - Principle of autrefois acquit, whether applicable - Scope of art. 7(2) Federal Constitution - Whether confined to punitive detention alone arising from criminal proceedings instituted under Attorney General's direction - Validity of detention order - Federal Constitution, arts. 5(3), 7(2), 145, 149, 150* H
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- A **CONSTITUTIONAL LAW:** *Fundamental liberties - Arrest and subsequent detention by police - Emergency (Public Order and Prevention of Crime) Ordinance 1969, detention under - Habeas corpus - Deprivation of legal representation during detention period - Whether invalidated detention process - Principle of autrefois acquit, whether applicable - Scope of art. 7(2) Federal Constitution - Whether confined to punitive detention alone arising from criminal proceedings instituted under Attorney General's direction - Validity of detention order - Federal Constitution, arts. 5(3), 7(2), 145, 149, 150*
- B
- C **CONSTITUTIONAL LAW:** *Right to counsel - Right of arrested person in preventive detention to counsel under art. 5(3) Federal Constitution - Whether deprivation of such right rendered detention process invalid*
- D **CONSTITUTIONAL LAW:** *Constitution - Federal Constitution - Distinction between powers conferred under Federal Constitution - Article 7(2) Federal Constitution - Whether confined to punitive detention alone arising from criminal proceedings instituted under Attorney General's direction - Federal Constitution, arts. 7(2), 145, 149, 150*
- E **CONSTITUTIONAL LAW:** *Legislature - Scope of legislative power - Distinction between powers conferred under Federal Constitution - Article 7(2) Federal Constitution - Whether confined to punitive detention alone arising from criminal proceedings instituted under Attorney General's direction - Federal Constitution, arts. 7(2), 145, 149, 150*
- F **CONSTITUTIONAL LAW:** *Autrefois acquit - Applicability of principle - Detention orders, validity of - Scope of art. 7(2) Federal Constitution - Whether confined to punitive detention alone arising from criminal proceedings instituted under Attorney General's direction*
- G **CONSTITUTIONAL LAW:** *Double jeopardy - Federal Constitution, art. 7(2) - Scope of - Whether confined to punitive detention alone arising from criminal proceedings instituted under Attorney General's direction - Whether principle of autrefois acquit applicable*
- H This was an appeal by the two appellants against the decision of the High Court Judicial Commissioner dismissing their application for a writ of *habeas corpus*. The relevant facts were that the appellants, charged at the Sessions Court in Temerloh for an offence under s. 304 of the Penal Code, were subsequently
- I acquitted and discharged. They were, however, arrested outside the Sessions Court and taken to the Temerloh Police Station where they were detained for a period of 60 days as provided

under the Emergency (Public Order and Prevention of Crime) Ordinance 1969 ('Ordinance'). The appellants were not given access to legal representation during the said detention period. They made a number of applications to the respondent seeking legal representation but to no avail until the detention orders were issued against them. The appellants submitted that there were two main issues requiring determination: (i) whether the appellants had been deprived of legal representation as provided under art. 5(3) of the Federal Constitution ('FC') during the 60 days' detention under s. 3 of the Ordinance, and whether this would invalidate the detention process issued under s. 4(1) of the Ordinance; and (ii) whether the doctrine of *autrefois acquit* applied to the appellants' case thus rendering the detention orders issued against them null and void. A further issue contended by the appellants, relying on the case of *Murugan Palanisamy & Ors v. Deputy Minister of Home Affairs & Ors*, was that the Deputy Minister, in not applying his mind to the allegation of fact to satisfy himself of the grounds upon which the detention orders were made against the appellants, had acted *mala fide* and prejudiced the appellants.

Held (dismissing the appeal)

Per Zulkefli Makinudin FCJ delivering the judgment of the court:

- (1) This court agreed with the principle laid down in earlier decided cases that a complaint by a person under lawful detention that he has been refused access to counsel contrary to the second limb of art. 5(3) of the FC will not have the effect of rendering his detention unlawful and that *habeas corpus* is not the proper remedy. *Mohamad Ezam Mohd Noor v. Ketua Polis Negara & Other Appeals* (refd); *Mohd Faizal Haris v. Timbalan Menteri Dalam Negeri, Malaysia & Ors* (refd); *Ooi Ah Phua v. Officer-In-Charge Criminal Investigation, Kedah/Perlis* (refd); *Lee Mau Seng v. Minister of Home Affairs, Singapore & Anor* (refd). (para 10)
- (2) The scope and extent of protection enshrined under art. 7(2) of the FC only apply to criminal offences wherein a person who has been acquitted or convicted of an offence by the court shall not be tried again for the same offence. In this regard, preventive detention of a detainee under the Ordinance cannot be equated with punitive detention of an accused person found guilty of committing an offence under criminal

- A law, and preventive detention made against the appellants in the present case was not subject to art. 7(2) of the FC. It is also necessary to state that there is a distinction between the power conferred under art. 145 of the FC which allows the Attorney General to decide the course of prosecution and the power of the Deputy Minister pursuant to the preventive legislations under arts. 149 and 150 of the FC. Hence, the scope of art. 7(2) of the FC is confined to punitive detention alone arising from criminal proceedings instituted under the direction of the Attorney General. As the appellants were later detained under the power of the Deputy Minister under s. 4(1) of the Ordinance it therefore followed that art. 7(2) of the FC and the principle of *autrefois acquit* did not apply to the appellants' case. *Musa Salleh v. PP* (foll); *Lee Kew Sang v. Timbalan Menteri Dalam Negeri, Malaysia & Ors* (foll). (paras 14, 15 & 16)
- (3) In the present case, it had been established from the Deputy Minister's affidavit-in-reply that he had in fact applied his mind to the allegation of fact to satisfy himself of the grounds upon which the detention order was made. The Deputy Minister had, therefore, not acted *mala fide*. *Murugan Palanisamy & Ors v. Deputy Minister of Home Affairs & Ors* (dist). (para 17)

Bahasa Malaysia Translation Of Headnotes

- F Ini adalah rayuan oleh kedua-dua perayu terhadap keputusan Pesuruhjaya Kehakiman Mahkamah Tinggi menolak permohonan mereka untuk writ *habeas corpus*. Fakta-fakta relevan ialah perayu-perayu, yang telah dituduh di Mahkamah Sesyen Temerloh atas suatu kesalahan di bawah s. 304 Kanun Keseksaan, telah kemudiannya dibebaskan dan dilepaskan. Mereka, walau bagaimanapun, ditahan di luar Mahkamah Sesyen dan dibawa ke Stesen Polis Temerloh di mana mereka ditahan selama 60 hari seperti yang diperuntukkan oleh Ordinan Darurat (Ketenteramaan Awam dan Mencegah Jenayah) 1969 ('Ordinan'). Perayu-perayu tidak diberi akses kepada perwakilan di sisi undang-undang semasa jangkamasa tahanan itu. Mereka telah membuat beberapa permohonan kepada responden menuntut perwakilan di sisi undang-undang tetapi tidak berhasil sehingga perintah-perintah tahanan dikeluarkan terhadap mereka. Perayu-perayu menghujah bahawa terdapat dua isu utama yang perlu diselesaikan: (i) sama ada perayu-perayu telah dilucutkan perwakilan di sisi undang-

undang seperti yang diperuntukkan di bawah Perkara 5(3) Perlembagaan Persekutuan ('PP') selama 60 hari dalam tahanan di bawah s. 3 Ordinan, dan sama ada ini mentaksahkan proses tahanan yang dikeluarkan di bawah s. 4(1) Ordinan; dan (ii) sama ada doktrin *autrefois acquit* terpakai kepada kes perayu-perayu dan, oleh itu, menyebabkan perintah-perintah tahanan yang dikeluarkan terhadap mereka batal dan tak sah. Sesuatu isu lanjutan yang diujah oleh perayu-perayu, bergantung pada kes *Murugan Palanisamy & Ors v. Deputy Minister of Home Affairs & Ors*, ialah bahawa Timbalan Menteri, dengan tidak menimbangkan kataan fakta supaya memuaskan dirinya tentang alasan-alasan atas mana perintah tahanan dibuat terhadap perayu, telah bertindak secara *mala fide* dan memprejudiskan perayu-perayu.

Diputuskan (menolak rayuan)

Oleh Zulkefli Makinudin HMP menyampaikan penghakiman mahkamah:

- (1) Mahkamah ini bersetuju dengan prinsip yang telah ditetapkan dalam kes-kes yang ditentukan terdahulu bahawa satu aduan oleh seseorang dalam tahanan sah yang beliau telah dinafikan akses kepada peguam yang bertentangan dengan cabang kedua Perkara 5(3) PP tidak mempunyai efek membuatkan tahanan beliau tidak sah dan bahawa *habeas corpus* tidak merupakan remedi yang betul. *Mohamad Ezam Mohd Noor v. Ketua Polis Negara & Other Appeals* (dirujuk); *Mohd Faizal Haris v. Timbalan Menteri Dalam Negeri, Malaysia & Ors* (dirujuk); *Ooi Ah Phua v. Officer-In-Charge Criminal Investigation, Kedah/Perlis* (dirujuk); *Lee Mau Seng v. Minister of Home Affairs, Singapore & Anor* (dirujuk).
- (2) Skop dan takat perlindungan yang ada di bawah Perkara 7(2) PP hanya terpakai kepada kesalahan-kesalahan jenayah di mana seorang yang telah dibebaskan ataupun disabitkan atas suatu kesalahan oleh mahkamah tidak boleh dibicara semula atas kesalahan yang sama. Sehubungan ini, tahanan pencegahan seseorang yang ditahan di bawah Ordinan tidak boleh disamakan dengan tahanan punitif seseorang tertuduh yang telah didapati bersalah melakukan suatu kesalahan di bawah undang-undang jenayah, dan tahanan pencegahan yang dibuat terhadap perayu-perayu dalam kes semasa tidak tertakluk kepada Perkara 7(2) PP. Ia juga perlu untuk menyatakan bahawa terdapat perbezaan di antara kuasa yang ada di bawah Perkara 145 PP yang membenarkan Peguam Negara

- A menentukan jalan pendakwaan dan kuasa Timbalan Menteri menerusi perundangan-perundangan tahanan di bawah Perkara-perkara 149 dan 150 PP. Oleh yang demikian, skop Perkara 7(2) PP dihadkan kepada tahanan punitif sahaja yang berbangkit daripada prosiding jenayah yang dimulakan di bawah arahan Peguam Negara. Oleh kerana perayu-perayu kemudiannya ditahan di bawah kuasa Timbalan Menteri di bawah s. 4(1) Ordinan ia, oleh itu, bererti bahawa Perkara 7(2) PP dan prinsip *autrefois acquit* tidak terpakai kepada kes perayu-perayu. *Musa Salleh v. PP* (diikuti); *Lee Kew Sang v. Timbalan Menteri Dalam Negeri, Malaysia & Ors* (diikuti).
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- (3) Dalam kes semasa, ia telah dibuktikan daripada affidavit jawapan Timbalan Menteri bahawa beliau telah sebenarnya menimbangkan kataan fakta supaya memuaskan dirinya tentang alasan-alasan atas mana perintah tahanan itu telah dibuat. Timbalan Menteri telah, oleh yang demikian, tidak bertindak secara *mala fide*. *Murugan Palanisamy & Ors v. Deputy Minister of Home Affairs & Ors* (dibezakan).
- D
- Case(s) referred to:**
- E *Lee Kew Sang v. Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2005] 3 CLJ 914 FC (**foll**)
Lee Mau Seng v. Minister of Home Affairs, Singapore & Anor [1971] 1 LNS 58 HC (**refd**)
Mohamad Ezam Mohd Noor v. Ketua Polis Negara and Other Appeals [2002] 4 CLJ 309 FC (**refd**)
- F *Mohd Faizal Haris v. Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2005] 4 CLJ 613 FC (**refd**)
Murugan Palanisamy & Ors v. Deputy Minister of Home Affairs & Ors [2000] 1 CLJ 147 HC (**dist**)
Musa Salleh v. Public Prosecutor [1973] 1 LNS 93 FC (**foll**)
- G *Ooi Ah Phua v. Officer-In-Charge Criminal Investigation, Kedah/Perlis* [1975] 1 LNS 117 FC (**refd**)
- Legislation referred to:**
Emergency (Public Order And Prevention of Crime) Ordinance 1969, ss. 3, 4(1)
- H Federal Constitution, arts. 5(3), 7(2), 145, 149, 150
Internal Security Act 1960, s. 73(1)
Penal Code, s. 304
- For the appellants - Dato' N Sivananthan (Tina Ong with him); M/s Sivananthan*
- I *For the respondents - Najib Zakaria SFC*
- Reported by Suresh Nathan*

JUDGMENT

A

Zulkefli Makinudin FCJ:

[1] This is an appeal by the two appellants against the decision of the learned Judicial Commissioner of the High Court at Kuala Lumpur in dismissing their applications for a writ of *habeas corpus*.

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[2] At the outset of the hearing of the appeal before us, learned counsel for both the appellants submitted that there are two main issues to be argued which can be summarized as follows:

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1. Whether the appellants have been deprived of legal representation as provided under Article 5(3) of the Federal Constitution during the sixty (60) days detention under section 3 of the Emergency (Public Order and Prevention of Crime) Ordinance 1969 ("the Ordinance") and this would invalidate the detention process issued under section 4(1) of the said Ordinance.

D

2. Whether the doctrine of *autrefois acquit* is applicable to both the appellants' case and thus the Detention Orders dated 11-12-2008 issued against the appellants were null and void.

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[3] The relevant background facts of the appellants' case are as follows:

[4] The appellants were charged at the Sessions Court in Temerloh, Pahang on 21 October 2000 for an offence under s. 304 of the Penal Code. On 13 October 2008, the appellants were acquitted and discharged from the charge framed against them. The appellants were however, arrested outside the Sessions Court in Temerloh on 13 October 2008 and were taken to the Temerloh Police Station whereby they were then detained for a period of sixty (60) days as provided under the Ordinance. The appellants were not given access to legal representation during the said detention period of sixty (60) days. A number of applications were made by the appellants to the respondents to enable them to be given access to legal representation but to no avail up to the day when the detention orders were issued against the appellants on 11 December 2008.

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[5] On the first issue learned counsel for the appellants submitted that the respondents had clearly deprived the appellants of their fundamental right as guaranteed under art. 5(3) of the Federal Constitution. Article 5(3) of the Federal Constitution states that:

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- A 5(3) Where a person is arrested he shall be informed as soon as may be of the grounds of his arrest and shall be allowed to consult and be defended by a legal practitioner of his choice.

- B [6] On the proper application of art. 5(3), learned counsel for the appellants submitted that this issue was discussed at great length by the Federal Court in the case of *Mohamad Ezam Mohd Noor v. Ketua Polis Negara and Other Appeals* [2002] 4 CLJ 309. Learned counsel referred to us a passage of the judgment of her Ladyship Siti Norma Yaakob, FCJ (as she then was) in *Mohamad Ezam's* case at p. 388 as follows:

- C On the facts of these appeals before us, I consider that allowing access only after the expiry of their detention is conduct unreasonable and a clear violation of Article 5(3). It also supports the appellants' contention that the denial amounts to *mala fide* on the part of the police that the ISA was used for a collateral purpose.

- D [7] However, it must also be stated here that her ladyship Siti Norma Yaakob, FCJ had also made pertinent observation which learned counsel did not refer to in the same case of *Mohamad Ezam* at p. 389 as follows:

- E Can *habeas corpus* lie to secure the immediate release of the appellants? I answer this by referring to some authorities.

- F In *Lee Mau Seng*, it was held that such a remedy is not available to persons like the appellants who after their arrests and under lawful detentions were refused their constitutional right under the second limb of art 5(3).

- G *Ooi Ah Phua* followed *Lee Mau Seng* and *habeas corpus* was refused on the ground that it is possible for a person to be lawfully detained and unlawfully denied communication with his lawyer.

- Likewise, in refusing to free an arrested person in police custody in the Indian case of *Sundar Singh v. Emperor* [1930] AIR Lahore 945, Bhide J had this to say:

- H It was argued by his counsel that the police custody became 'improper' as the police refused to allow even the prisoner's legal adviser to have access to him. This is somewhat a debatable point, and although I have come to the conclusion that the police were not justified in refusing the prisoner to be interviewed by his legal adviser, I think,
- I this cannot by itself be considered to be sufficient ground for setting him at liberty at once in the circumstances of the case.

The rationale for refusing *habeas corpus* in the three cases that I have cited seems to be this. A complaint by a person while under lawful detention that he has been refused access to counsel contrary to the second limb of art 5(3) will not have the effect of rendering his detention unlawful and that *habeas corpus* is not the proper remedy. It would be otherwise if for example, there has been a failure to inform the person arrested of the grounds of his arrest, contrary to the first limb of art 5(3) and such failure would render his subsequent detention unlawful. Clearly, it is the legal status of the detention that determines whether *habeas corpus* can issue to secure the freedom of a detained person as guaranteed by art 5(2) of our Constitution.

[8] It is to be noted that in *Mohamad Ezam's* case denial of access to legal representation was not the only ground relied upon by the appellants to secure their freedom. From the judgments of the other three member panels comprising of Mohamed Dzaiddin, CJ, Steve Shim Lip Kiong, CJ (Sabah & Sarawak) and Abdul Malek Ahmad, FCJ (as he then was) the appellants therein had succeeded in establishing that their detentions under s. 73(1) of the ISA are unlawful based on grounds other than denial of access to legal representation. Therefore, in the context of the present case such failure by the respondents to accommodate legal representation as enshrined under art. 5(3) of the Federal Constitution to the appellants during the sixty (60) days detention under s. 3 of the Ordinance will not render the *habeas corpus* application of the appellants successful on such ground.

[9] Still on the issue of the legal consequence of the appellants having been deprived of legal representation under art. 5(3) of the Federal Constitution during the sixty (60) days detention under s. 3 of the Ordinance useful reference may be made to the case of *Mohd Faizal Haris v. Timbalan Menteri Dalam Negeri, Malaysia & Ors.* [2005] 4 CLJ 613 wherein his lordship Augustine Paul, FCJ in delivering the judgment of the Federal Court on the detention of the appellant under the Dangerous Drugs (Special Preventive Measures) Act 1985 at p. 628 had this to say:

The general rule that a writ of *habeas corpus* must be directed against the current order of detention therefore applies where a detention under section 6(1) has been made subsequent to an arrest and detention under section 3(1) and (2). It follows that where a detention order has been made under section 6(1) the writ of *habeas corpus* must be directed only against that order even if the earlier arrest and detention are irregular.

- A [10] Therefore any irregularity in the arrest and detention of the appellants in the present case made under s. 3 of the Ordinance when it has been superceded by one under s. 4(1) of the Ordinance is not a relevant matter for consideration. It must be noted in the present case that the appellants have not alleged any
- B irregularity in respect of their arrest and detention during the sixty (60) days of detention. However the appellants' complaints were more in relation to the fact that they have been denied the right to legal representation at that stage. Their learned counsel posed the question to us as to how then would they be able to file a
- C writ of *habeas corpus* against such procedural irregularities which had occurred during their arrest and detention within the sixty (60) days period without them being given access to counsel. Our short answer to the question posed is that we agree with the principle laid down in earlier decided cases that a complaint by a person
- D under lawful detention that he has been refused access to counsel contrary to the second limb of art. 5(3) will not have the effect of rendering his detention unlawful and that *habeas corpus* is not the proper remedy. (See the case *Ooi Ah Phua v. Officer-In-Charge Criminal Investigation, Kedah/Perlis* [1975] 1 LNS 117 and *Lee Mau Seng v. Minister of Home Affairs, Singapore & Anor.* [1971] 1 LNS 58).
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- [11] On the second issue raised in this appeal learned counsel for the appellants submitted that the doctrine of *autrefois acquit* is applicable to the appellants' case. Article 7(2) of the Federal Constitution states as follows:
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- 7(2) A person who has been acquitted or convicted of an offence shall not be tried again for the same offence except where the conviction or acquittal has been quashed and a retrial ordered by
- G a court superior to that by which he was acquitted or convicted.

- [12] In the present case the prosecution itself had applied to the court to withdraw the charges against the appellants and the Sessions Court in Temerloh had accordingly acquitted and discharged the appellants. It is the appellants' contention that since the appellants had been acquitted and discharged from the charge, the detention orders later issued against them are thereof invalid. Article 7(2) of the Federal Constitution lays down the principle that a person shall not be placed in "double jeopardy" and be punished twice for the same offence. In the present case it is the contention of the appellants that they have been punished twice for the same offence.
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[13] Learned counsel for the appellants also submitted that we should take note that the sole allegation of fact which is stated in the detention orders dated 11 December 2008 was exactly the same as the charge preferred against the appellants at the Sessions Court in Temerloh. The appellants contended that there is clear evidence that the Deputy Internal Security Minister (“Deputy Minister”) had not applied his mind to the allegation of fact to satisfy himself that the appellants were in fact members of a criminal gang involved in crime of violence, being the grounds upon which the detention orders were made against the appellants. The Deputy Minister had therefore acted *mala fide* and had prejudiced the appellants. On this point learned counsel for the appellants referred to us the case of *Murugan Palanisamy & Ors. v. Deputy Minister of Home Affairs & Ors.* [2000] 1 CLJ 147 wherein the High Court at pp. 152 and 153 in the said case held that:

My second ground in allowing the application of the applicant for a writ of *habeas corpus* is pivoted on the argument that the Deputy Minister in his affidavit has failed to consider and state why there should not be a criminal prosecution instituted against the applicant bearing in mind that there is only one offence involved and this offence falls squarely within a prescribed offence of armed robbery under the Penal Code. The allegation of facts against the applicant that were attached to the said detention order contained only one charge reproduced as follows:

1. Bahawa kamu pada 8-9-1997, lebih kurang jam 9.25 pagi bertempat di stesyen minyak Shell, Gaya service, No. Lot 109 & 1254, Seksyen 5, Jalan Chain Ferry, Butterworth, Pulau Pinang bersama-sama dengan rakan kamu dengan bersenjatakan sepucuk pistol telah menyamun wang tunai dari stesyen minyak tersebut. Sebanyak RM20,000 telah berjaya disamun dari kejadian tersebut.

I am of the view that the ordinary criminal process is not to be circumvented or short circuited by ready resort to preventive detention ... However, the failure of the detaining authority to consider and state the possibility of launching a criminal prosecution may, in the circumstances of the case lead to a conclusion that the detaining authority had not applied his mind to the vital question whether it was necessary to make such an order when an ordinary criminal prosecution could well serve the purpose. I am of the view that if the detaining authority fails to satisfy the court that the detaining authority so bore the said

- A question in mind, the court would be justified in drawing the inference that there was no application of the mind of the detaining authority to the vital question whether it was necessary to preventively detain the detenu. I find support of this argument by reference to the case of *Hemlata v. State of Maharashtra*, AIR [1982] SC 8 wherein in that case it was held *inter alia* that the aspect relating to possibility of criminal prosecution must also be borne in mind while ordering detention. I would also venture to state in the circumstances of this case and bearing in mind there is only one allegation of fact relating to the one offence alleged to have committed by the applicant could lead to an inference that there was *mala fide* on the part of the detaining authority in ordering the detention of the applicant.
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- [14] With respect, we could not agree with the contention of the appellants that the doctrine of *autrefois acquit* applies to the appellants' case. We are of the view that the scope and extent of protection enshrined under art. 7(2) of the Federal Constitution only applies to criminal offences wherein a person who has been acquitted or convicted of an offence by the court shall not be tried again for the same offence. In this regard we would categorically state here that preventive detention of a detainee under the Ordinance cannot be equated with punitive detention of an accused person found guilty for committing an offence under the criminal law and that preventive detention made against the appellants in the present case is not subject to art. 7(2) of the Federal Constitution. On this point we would refer to the Federal Court's decision in *Musa bin Salleh v. Public Prosecutor* [1973] 1 LNS 93 wherein Suffian FJ (as he then was) stated as follows:
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- In considering this matter I bear in mind that if there is any ambiguity in the law the Court should lean in favour of the liberty of the subject which should in no way be diminished except by the clearest of language used in the law. Bearing the above principle in mind, I have come to the conclusion that I cannot agree with the submissions made on behalf of the appellant, that in my view the impugned order was valid, and that the answer to question (b) is yes. I am of the opinion that if on one set of facts a detention order under paragraph (a) is made by the executive it is open to them on the same facts to extend that order under sub-section (1A) and that also on the same facts it is open to them after the expiry of that order to substitute for it a restriction order made under paragraph (b). *Be it noted that a detention order is not a conviction for an offence that has been proved against the detainee. If it were, then clearly he could not be detained*
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again on the same facts. On the contrary a detention order is an administrative order; it is not to punish the detainee. The detention order is preventive detention, with a view in the words of s. 8 'to preventing (the detainee) from acting in any manner prejudicial to the security of Malaysia or any part thereof'. If the Yang di-Pertuan Agung is on one set of facts satisfied that with a view to preventing a person from acting in that way it is necessary to order his preventive detention in 1964, in my view it is permissible for him after a fresh consideration of the same facts to extend his detention two years later and that it is equally permissible for him after a further consideration of the same facts to make a restriction order against him in 1968. In my view the fact that the executive could just as well suspend the detention order under s. 10 does not prejudice their power to act under para (b) of s. 8. (emphasis added)

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[15] It is also necessary that we state here there is a distinction between the power conferred under art. 145 of the Federal Constitution which allows the Attorney General to decide the course of prosecution and the power of the Minister pursuant to the preventive legislations under arts. 149 and 150 of the Federal Constitution. On this point we would refer to the Federal Court's decision in *Lee Kew Sang v. Timbalan Menteri Dalam Negeri, Malaysia & Ors.* [2005] 3 CLJ 914 wherein Abdul Hamid Mohamad, FCJ (as he then was) at pp. 931 and 932 observed as follows:

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The power to institute criminal proceedings lies with the Attorney General and is provided by art. 145(3) of the Federal Constitution: ...

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On the other hand, power to order detention under the Ordinance lies with the Minister by virtue of s. 4(1) of the Ordinance which has been reproduced.

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These are two distinct powers under two different laws. The Attorney General and the Minister, respectively, have power given to them by the respective laws. So, just as the Attorney General has power to institute proceedings but not the power to order detention, the Minister has power to order detention but not to institute proceedings. Just as it is not within the power of the Attorney General to consider making an order of detention, it is also not within the power of the Minister to consider the institution of criminal proceedings. What is the purpose of considering doing something that they, respectively, have no power to do? Indeed, if the Minister considers the institution of criminal proceedings, in a judicial review application, it would not be

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A surprising to hear arguments that the Minister has exceeded his jurisdiction or that he has taken into consideration matters which he should not.

B The law also does not require the Minister to refer the matter before him to the Attorney General first for his consideration whether to institute criminal proceedings before considering whether to issue a detention order. Similarly, the law does not require otherwise, ie, for the Attorney General to refer the matter before him to the Minister first for consideration whether the detention order should be made before considering whether to institute criminal proceedings. Their powers are separate and provided for by different laws. Indeed, even the powers of the police to arrest a person that leads to the institution of criminal proceedings and to detain a person with a view of detention by the Minister are provided by different laws, the former mainly under the Criminal Procedure Code, the latter under the Ordinance.

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E *So the first thing that one should be clear about is that there are two distinct and separate laws for different purposes to be exercised by two different authorities. Once we get that clear, then the argument that the Minister should have considered the institution of proceedings first collapses. The Minister has no such power and indeed, it will be ultra vires his jurisdiction to do so. That should dispose of the first argument without even any reference to case law. (emphasis added)*

F [16] It is clear based on the above quoted passage that the scope of art. 7(2) of the Federal Constitution is confined to punitive detention alone arising from criminal proceedings instituted under the direction of the Attorney General. As the appellants were later detained under the power of the Minister under s. 4(1) of the Ordinance it therefore follows that art. 7(2) of the Federal Constitution and the principle of *autrefois acquit* do not apply to the appellants' case.

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H [17] As regards the case of *Murugan Palanisamy & Ors. v. Deputy Minister of Home Affairs & Ors (supra)* cited in support of the appellants' case, we are of the view the said case can be distinguished from the present case. In the case of *Murugan Palanisamy* the appellant who was arrested and detained under the Ordinance was not first charged before the court unlike in the present case. It was also established in *Murugan Palanisamy's* case that the Deputy Minister had not applied his mind to the allegation of fact to satisfy himself of the grounds upon which the

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detention order was made. In the present case it has been established from the affidavit-in-reply of the Deputy Minister that he had in fact applied his mind to the allegation of fact to satisfy himself of the grounds upon which the detention order was made. The Deputy Minister therefore had not acted *mala fide*. At para 13 of his affidavit-in-reply the Deputy Minister had stated that he was aware of the acquittal and discharge of the appellants by the Sessions Court at Temerloh but stated that the exercise of power by him under the Ordinance to detain the appellants is not the same as that of the exercise of power by the Attorney General to charge the appellants before the court under the criminal law. In this regard para 14 of the affidavit-in-reply of the Deputy Minister is also reproduced as follows:

14. Merujuk kembali kepada perenggan 20, 23 dan 25(j) dalam Afidavit Pemohon, saya sekali lagi ingin menegaskan bahawa alasan-alasan Perintah Tahanan dan Pengataan-Pengataan Fakta yang atasnya Perintah itu diasaskan adalah sah dan sempurna tanpa ada sebarang kecacatan serta termasuk dalam lingkungan perkara dan skop seksyen 4(1) Ordinan tersebut dan justeru itu saya sesungguhnya menolak sekeras-kerasnya dakwaan Pemohon bahawa ianya telah dirangkakan secara dengan sikap *mala fide* dan bemosif jahat. Saya juga menyatakan bahawa dakwaan dengar cakap (hearsay) tidak timbul dalam menjalankan kuasa saya di bawah Ordinan tersebut kerana saya telah meneliti dan mengkaji alasan-alasan dan laporan siasatan berdasarkan kepada fail siasatan dan laporan hal penangkapan dan tahanan terhadap Pemohon dan saya telah menggunakan minda saya serta mengaplikasikan fikiran saya yang kemudiannya menjurus kepada penentuan keputusan saya untuk menahan Pemohon selaras di bawah seksyen 4(1) Ordinan tersebut mulai 11-12-2008 bagi tempoh dua (2) tahun di Pusat Pemulihan Akhlak, Simpang Rengam, Johor.

[See page 244 of the Appeal Record Volume 2].

[18] For the reasons above stated we would dismiss the appellants' appeal.